IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:	)	In Proceedings
WILLIAM C. RUSSELL, d/b/a	)	Under Chapter 7
FRANK RUSSELL & SON TRUCKING	)	
CO., d/b/a FRANK RUSSELL &	)	No. BK 95-40698
SON TRANSFER CO.,	)	
Debtor(s).	)	

OPINION

Creditor, DeWayne Keene, has filed a motion asking the Court to vacate the Order of Relief entered in this case and to dismiss the debtor's bankruptcy case on the basis that the debtor is prohibited from filing this case within 180 days following the dismissal of a prior chapter 11 case. The creditor's motion presents the issue of whether the debtor's chapter 11 case was dismissed by the Court for willful failure of the debtor to abide by orders of the Court or to appear before the Court in proper prosecution of the case.

The debtor filed a chapter 11 case (case no. 93-40870) on November 19, 1993, and during the next sixteen months submitted a series of four plans toward the goal of confirmation. After the debtor submitted a third amended plan on March 29, 1995, which was met with objections from Mr. Keene, among others, the U.S. trustee moved for dismissal of the chapter 11 case or for conversion to chapter 7. The U.S. trustee contended in his motion that the debtor's case was "too old," that "unreasonable delay by the debtor that is prejudicial to creditors" existed, and that the case should be dismissed or converted should the debtor not be able to obtain confirmation of the third amended plan.

On May 30, 1995, the Court conducted a hearing on confirmation of the third amended plan and on the U.S. trustee's motion to dismiss or

convert the case. The creditors opposing confirmation of the plan, including Mr. Keene, appeared at the hearing, as did the debtor and the U.S. trustee. At the start of the hearing, the debtor advised the Court that he consented to the dismissal of his pending case and that he was planning to file a chapter 13 case after his chapter 11 case was dismissed. The Court then polled the U.S. trustee and the creditors concerning their desires for dismissal or conversion to chapter 7. When all parties present, including Mr. Keene, stated that they had no objection to the dismissal of the debtor's case, the Court ordered the case dismissed effective June 29, 1995.[1] Subsequently, on June 30, 1995, the Court entered a written order which stated, in relevant part, "IT IS ORDERED that this case is dismissed." Notice was sent to all creditors and other parties in interest on July 11, 1995, advising them that the debtor's chapter 11 case had been dismissed "due to failure to effectuate a plan of reorganization."

After the debtor filed a new petition for relief on July 31, 1995,[2] Mr. Keene filed the instant motion asserting that the debtor's chapter 11 case had been dismissed by the Court based on the debtor's willful failure to abide by orders of the Court or to appear before the Court in proper prosecution of the case. According to Mr. Keene, the debtor is ineligible for relief under the Bankruptcy Code during the

---

[1] The dismissal was subject to certain conditions, not relevant here, with which the debtor complied.

[2] The debtor filed a chapter 13 petition on July 31, 1995. His case was later voluntarily converted to a chapter 7 case.

180-day period set forth in § 109(g)(1) of the Bankruptcy Code.[3]

Section 109(g)(1) is intended to "prevent[] certain tactics on the debtor's part that could be deemed abusive." 2 Collier on Bankruptcy ¶ 109.06, at 109-35 (15th ed. 1995). To accomplish this goal, it precludes from bankruptcy eligibility for a period of 180 days any debtor who willfully[4] disobeys court orders or who willfully fails to appear as required and who suffers dismissal of his or her case as a result. 2 Collier on Bankruptcy ¶ 109.06, at 109-35.[5]

Courts appear to follow one of two approaches in reaching a determination of eligibility under § 109(g)(1). Under the first

---

[3] The section provides, in relevant part:

> (g) Notwithstanding any other provision of this section, no individual . . . may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if --
>
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case . . . .

11 U.S.C. § 109(g)(1).

[4] Lacking a definition of "willfulness" in the Bankruptcy Code, courts have given the term its common meaning. A debtor's conduct is "willful" under § 109(g)(1) when it is intentional, knowing and voluntary, as opposed to accidental or beyond the debtor's control. E.g., In re Walker, 171 B.R. 197, 203 (Bankr. E.D. Pa. 1994).

[5] The phrase "willful failure of the debtor . . . to appear before the court in proper prosecution of the case" has been read broadly by some courts to include the deliberate failure of debtors to perform their duties, whether those be filing schedules, making plan payments to the trustee, or attending meetings of creditors. E.g., In re King, 126 B.R. 777, 780-81 (Bankr. N.D. Ill. 1991). As discussed below, even under this expansive interpretation of the phrase, Mr. Keene does not prevail.

approach, the court deciding eligibility merely looks at whether or not the dismissing court specifically held that dismissal was based on the type of willful conduct set forth in § 109(g)(1). E.g., In re Hammonds, 139 B.R. 535, 540 (Bankr. D. Colo. 1992); In re Marlatt, 116 B.R. 703, 707 (Bankr. D. Neb. 1990). Under the second approach, irrespective of the absence of a finding of willful conduct by the dismissing court, the court deciding eligibility examines whether the debtor's conduct during the prior case amounted to the type of willful conduct which warrants the § 109(g) sanction. E.g., In re Montgomery, 37 F. 3d 413, 414-15 (8th Cir. 1994).

In the instant case, the Court need not decide which approach to adopt since, under either analysis, Mr. Keene fails to prevail. In dismissing the debtor's chapter 11 case, this Court made no finding that the debtor had willfully disobeyed its orders or had failed to appear before it to prosecute his case as required. The record is clear that the debtor's chapter 11 case was dismissed on the motion of the U.S. trustee, with the debtor's consent, because all parties present -- including Mr. Keene -- believed that the debtor was unable to propose a confirmable plan.

Moreover, the Court has examined the debtor's conduct during the chapter 11 case and finds no evidence of the abusive tactics which § 109(g)(1) is intended to curtail. While Mr. Keene makes sweeping allegations that the debtor repeatedly failed to abide by the orders and rules of the Court during the chapter 11 case, he has offered only three specific examples of aggrieving conduct. The Court will address each of these in turn.

Mr. Keene's first complaint relates to the debtor's repeated failure to correctly "list" the amount of the debt owed to Mr. Keene. He contends that he was forced to file a series of objections to the "listing" of his debt yet, upon appearing in Court each time, the debtor would stipulate that Mr. Keene's figure was correct. Mr. Keene has failed to delineate for the Court when and where the false "listings" occurred or how they amount to a violation of the Court's orders or to a failure to appear and prosecute his case. Clearly, Mr. Keene bears the burden of establishing, in the first instance, that an order of the Court was violated or that the debtor was remiss in specific duties. See, e.g., In re Olson, 102 B.R. 147, 150 (Bankr. C.D. Ill. 1989) ("party moving for dismissal under Section 109(g)(1) has the burden of introducing evidence to support its averment"); In re Pretzer, 96 B.R. 790, 792 (Bankr. N.D. Ohio 1989). He has failed to do even that. Moreover, as the record stands, the Court has no more reason to find willful disobedience or flaunting of duty than to find an honest dispute over the amount of Mr. Keene's claim or an inadvertent mistake in failing to amend the "listing." See, e.g., In re Madison, 184 B.R. 686, 693 (Bankr. E.D. Pa. 1995) (moving party bears the burden of proving willfulness); In re Arena, 81 B.R. 851, 852 (Bankr. E.D. Pa. 1988).[6]

Next, Mr. Keene contends that the debtor failed to notify Mr.

[6] The Court notes that some courts, once the movant proves that an order has been violated or an appearance disregarded, shift the burden to the debtor to show that the aggrieving conduct was accidental or beyond the debtor's control, rather than intentional. E.g., In re Montgomery, 37 F. 3d at 415; In re Yensen, No. 95-00466, 1995 WL 468197, at *1 (Bankr. D. Idaho July 17, 1995).

Keene of various hearings. However, again Mr. Keene does not provide the Court with specific dates or hearings which would allow the Court to isolate the conduct in question to determine if an order was disobeyed or a duty breached. The Court is unwilling to search the entire record looking for alleged service defects which Mr. Keene himself has not taken the time to note. Even if the Court were to assume that service defects did occur, it does not necessarily follow that an order was violated or that any dereliction of duty was purposeful or that dismissal of the debtor's case was a consequence of such conduct.

Mr. Keene's last argument in support of dismissal under § 109(g)(1) is based on the debtor's failure to serve copies of monthly reports on the creditors and to file copies with the Court. Mr. Keene concedes that the debtor did provide monthly reports to the U.S. trustee and that the debtor did correct this error when it was called to his attention. Accordingly, the Court finds no willful misconduct by the debtor here. Dismissal pursuant to

§ 109(g)(1) is not appropriate.

See Order entered this date.

DATED: NOVEMBER 2, 1995

/s/ Kenneth J. Meyers
United States Bankruptcy Judge